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NO. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner,

v.

CHESAPEAKE BAY FOUNDATION, INC.,
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the federal district courts have jurisdiction under Section 505 of the Clean Water Act, 33 U.S.C. 1365(a), to entertain "citizen suits" seeking civil penalties for chronic episodic violations of the Act that occurred prior to the filing of the suit.

PARTIES TO THE PROCEEDINGS

Respondents and plaintiffs-appellees below are Chesapeake Bay Foundation, Inc., and Natural Resources Defense Council, Inc. Chesapeake Bay Foundation, Inc., a tax-exempt corporation organized under the laws of the State of Maryland, operates state offices in Maryland, Pennsylvania, and Virginia, and has members in all 50 states and the District of Columbia. In Virginia, Chesapeake Bay Foundation has two subsidiary chapters, the Hampton Roads Chapter, comprised of members residing in the Hampton Roads area, and the York Chapter, comprised of members residing in the vicinity of the York River. Natural Resources Defense Council, Inc., is a not-for-profit membership corporation organized under the laws of the State of New York, with

offices in New York, Washington, D.C., and San Francisco, California. Petitioner and defendant-appellant below Gwaltney of Smithfield, Ltd. is a wholly-owned subsidiary of Smithfield Foods, Inc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 791

F.2d 304. The opinion of the district court (Pet. App. 26a-74a) is reported at 611 F. Supp. 1542.

JURISDICTION

The judgment of the court of appeals (Pet. App. 75a-76a) was entered on May 22, 1986. A petition for rehearing was denied on June 26, 1986 (Pet. App. 77a-78a). The petition for a writ of certiorari was filed on September 23, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), provides as follows (emphasis added):

> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own be-

half--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such an act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

STATEMENT

1. Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. 1342, petitioner possesses a permit to discharge specified amounts of pollutants from its meat packing plant into the Pagan River, a tributary of the Chesapeake Bay (Pet. App. 2a, 3a, 27a-28a; App., infra 4a).[1] Petitioner exceeded the discharge limitations in its permit on numerous occasions between October 27, 1981--the date on which petitioner acquired the meat packing plant and thereby assumed responsibility for the plant's discharges--and June 15, 1984--the date on which respondents commenced this action for declaratory and injunctive

[1] The pollutants are fecal coliform, chlorine, total suspended solids, total Kjeldahl nitrogen, and oil and grease (Pet. App. 5a n. 5).

relief and the imposition of civil penalties payable to the United States Treasury.[2] Petitioner's own Discharge Monitoring Reports ("DMRs")[3] constituted the proof of its permit violations (Id. at 5a).

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[2] In its Findings of Fact and Conclusions of Law as Stated from the Bench (App., infra 1a-7a), the district court found that petitioner had exceeded the discharge limitations contained in its permit on at least 237 occasions between January 1979 and June 15, 1984 (Id. at 5a). The court subsequently agreed with petitioner's contention that it should be relieved of liability for violations that had occurred prior to petitioner's acquisition of the plant. Thereafter, the parties stipulated that 160 post-acquisition reported violations had occurred (Pet. App. 45a n. 12). The stipulation did not relate to the number of "days of violation" involved.

[3] DMRs are required by the Clean Water Act and regulations promulgated thereunder. See 33 U.S.C. 1318(a), 1342(a)(1) and (2); 40 C.F.R. 122.41(l)(4) and 123.25(a)(12).

Respondents invoked the jurisdiction of the district court pursuant to Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), which authorizes "citizen suits" to be brought against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this chapter* * *." Respondents complied with the statutory prerequisites for an action under Section 505(a) by providing petitioner, the Administrator of the United States Environmental Protection Agency ("EPA"), and the Virginia State Water Control Board with more than 60 days' notice of their intent to bring suit. See Section 505 (b)(1)(A) of the Act, 33 U.S.C. 1365(b) (1)(A). Specifically, respondents gave notice of their intent to sue on February 29, 1984 (See Pet. App. 80a). Petitioner's permit violations, as reflected

by its subsequent DMRs, continued until May 15, 1984, or some two-and-one-half months after respondents gave notice of their intent to sue (Id. at 4a-5a, 80a). Respondents accordingly filed suit on June 15, 1984, based on continuing permit violations as shown on the DMRs available at the time the complaint was filed (Id. at 82a-83a). Not until after the filing of the complaint were any violation-free months reported by petitioner.[4]

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[4] Petitioner would have the Court believe that it was in general compliance with its permit in March 1984, when the Virginia State Water Control Board (to which the authority to issue permits under the Act has been delegated by EPA) decided not to initiate an enforcement action against petitioner in state court (See Pet. 4-5 & n. 3). In actuality, the Board declined to initiate such an action in March because a Gwaltney official testified under oath that petitioner was in compliance (Ct. App. Ex.

2. On August 28, 1984, the district court granted summary judgment for respondents on the issue of liability, there being no dispute that the permit violations had occurred (App., infra 6a). The question of remedy was set for trial in December, 1984.

On May 16, 1985, more than eight months after the district court's ruling

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(Footnote Continued)

Vol. 422-423). But petitioner continued to violate its permit in March, and the violations were not abated until May 15, 1984 (Id. at 314-323). A violation-free month was not reported until the June 1984 DMR, which was filed after respondents had initiated this action (Pet. App. 86a). Contrary to the impression it seeks to convey, therefore, petitioner appears very much to have been the type of chronic episodic violator who "intentionally 'turns off the spigot' just before a citizen brings a suit" (Pet. 7 n. 4 (quoting Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392, 399 (5th Cir. 1985) (Williams, J., concurring)).

on liability and more than four months after trial on the remedy, petitioner moved to dismiss the action for lack of jurisdiction. Petitioner relied on Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985), in which the court held that Section 505 does not authorize citizen suits for civil penalties if the violations alleged in the complaint are not "ongoing" at the time of suit. Relying on the post-complaint DMRs that reported no violations subsequent to May 15, 1984, petitioner contended that it was not "in violation" of its permit at the time this suit was filed.

The district court rejected petitioner's argument on two alternative grounds (Pet. App. 33a-43a). First, the court concluded that the words "to be in violation," as used in Section 505(a)

of the Act, "may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present" (Id. at 34a). Alternatively, the court held that respondents' allegations in the complaint of continuing violations were made in complete good faith. The court thus reasoned that, "even if [petitioner] were correct that a district court has no jurisdiction over citizen suits based entirely on unlawful conduct that occurred entirely in the past, the Court would still have jurisdiction here" (Id. at 38a n.8). The court analogized to the jurisdictional amount requirement in diversity cases, which is tested not by the amount the plaintiff actually recovers but by the amount stated in good faith in the original claim (Id. at

38a-39a n.8). The allegations in respondents' complaint satisfied the good faith test, the court concluded, because "there was no certainty here--legal, factual, or otherwise--that [petitioner's] system would correct one of the two major violation problems for which this suit was brought--until nearly one year after the suit was filed" (Id. at 39a n.8).

The district court then determined the maximum civil penalty for which petitioner could be held liable. The court ruled that the maximum number of days of liability for violations of monthly averages contained in petitioner's permit was the number of days in the month, but that the maximum daily penalty was limited by statute (33 U.S.C. 1319(d)) to $10,000 per day, regardless of the number of violations in a

given day (Pet. App. 43a-51a). Applying these principles, the court calculated petitioner's maximum potential civil penalty to be $6,660,000 (Id. at 51a-53a). Using EPA's Civil Penalty Policy, 41 Env't Rep. Cas. (BNA) (Fed. Laws) 2991 (1984), as a nonbinding guideline (Id. at 53a), the court then determined that the appropriate penalty to be assessed against petitioner was $1,285,322 (Id. at 71a). In setting the amount of the penalty, the district court noted that petitioner's response to specific discharge problems at the plant "trivialize[d] [their] seriousness," was "nothing less than offensive," "border[ed] on benign neglect," and contributed to hundreds of days of violations that, by petitioner's own admission, could have been prevented (Id. at 59a 60a, 62a, 69a). The court also found

that petitioner had derived significant economic benefit from its delays in bringing the plant's biological treatment system into compliance (Id. at 55a-58a, 66a-67a).

3. The court of appeals affirmed the district court's judgment in all respects (Pet. App. 1a-25a). Specifically, the court held: (1) that the absence of an ongoing violation at the time the complaint is filed does not defeat federal jurisdiction under Section 505(a) of the Clean Water Act in an action for civil penalties (Pet. App. 7a-18a, 25a); (2) that, in setting an "appropriate" civil penalty under 33 U.S.C. 1319(d), violations of "average" limitations encompassing periods greater than one day are to be treated as a violation for each day of the time period involved (Pet. App. 18a-22a, 25a); and

(3) that the district court did not abuse its discretion in calculating the penalty actually assessed against petitioner (Id. at 22a-25a).[5] With respect to the issue that petitioner asks this Court to review, the court of appeals ruled that petitioner's narrow reading of Section 505(a), "creating jurisdiction to impose [civil] penalties only in suits involving violations that continue up to the time suit is filed, places an untenable limitation on the use of citizen suits and civil penalties as a tool of enforcement and deterrence" (Pet. App. 18a).

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[5] Petitioner has not asked this Court to review the latter two issues.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court, and would not serve as an appropriate vehicle for resolution of the conflict that petitioner alleges between the decision below and Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985). Accordingly, review by this Court is not warranted.

1. a. Section 505(a) of the Clean Water Act, 33 U.S.C. 1365(a), authorizes citizen suits to be maintained against any person "who is alleged to be in violation of" various requirements imposed under the Act. Petitioner contends (Pet. 7-10) that Congress's use of the present tense in the drafting of

this section so plainly forecloses citizen suits founded on pre-complaint violations that further analysis is unnecessary. However, as the courts below correctly have held, petitioner's reading of the statutory language is not the only possible interpretation of the words Congress chose. To the contrary, as the district court below noted, "the language is ambiguous" (Pet. App. 8a); and as the court of appeals below stated, "the words 'to be in violation' may reasonably be read as comprehending unlawful conduct that occurred solely prior to the filing of the lawsuit as well as unlawful conduct that continues into the present" (Id. at 34a). As another court has explained (Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. 1190, 1195 (D.N.J. 1985)):

> "A plausible construction of the language is that one is 'in violation,' and continues to be 'in violation' by having 'violated.' In other words, the taint of a past violation is continuing." Student Public Interest Research Group of New Jersey v. Monsanto Co., 600 F. Supp. 1474, 1476 (D.N.J. 1985)* * *. It would not be odd locution to say someone is "in violation" of the tax laws even though he or she filed the fraudulent return two or three years ago, or "in violation" of election laws for failing to report campaign contributions received for a past campaign. Similarly, a polluter might be "in violation" of the [Clean Water Act] for violations of two or three years ago.

This construction of Section 505(a) comports with the structure of the Act as a whole. Virtually all of the Act's enforcement provisions, including those authorizing enforcement actions by EPA, are written in the present tense. See, e.g., Section 309(a)(1), 33 U.S.C. 1319 (a)(1) (emphasis added) (the Administrator is authorized to take enforcement

actions whenever he "finds that any person is in violation of any condition or limitation * * *); Section 309(a)(3), 33 U.S.C. 1319(a)(3) (emphasis added) (the Administrator may issue a compliance order when he "finds that any person is in violation" of provisions of the statute); Section 309(c), 33 U.S.C. 1319(c) (emphasis added) (criminal penalties may be imposed against "any person who willfully or negligently violates" provisions of the statute or permit conditions or limitations); Section 309(d), 33 U.S.C. 1319(d) (emphasis added) (civil penalties may be imposed against "any person who violates" provisions of the statute or permit limitations or conditions).

Thus, if petitioner's reading of Section 505(a) were to be accepted, the conclusion would follow inescapably that

EPA is likewise prohibited from taking any enforcement action against polluters whose violations ceased prior to the filing of suit. But the courts have consistently rejected reading any such limitation into EPA's enforcement powers. See, e.g., United States v. Earth Sciences, Inc., 599 F.2d 368, 376 (10th Cir. 1979) ("It is plainly inconsistent with the strong enforcement policy of the Act to declare that EPA must choose between prevention of future pollution discharges and punishment of past violations through civil penalties."). Accord Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198; United States v. Detrex Chemical Industries, Inc., 393 F. Supp.

735, 737-738 (N.D. Ohio 1975).[6] Petitioner's reading of the statute also attributes to Congress the implausible intent to ascribe one meaning to Section 309(d) of the Act in the case of citizen suits and another meaning to the same section in the case of governmental enforcement actions. Section 505(a) ex-

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[6]Petitioner contends (Pet. 12-13) that the issue of the Administrator's authority to seek civil penalties for past violations is not presented in this case and that the Court should therefore disregard the cases holding that the Administrator does indeed possess such authority. But there is no reason for the Court to disregard judicial constructions of other sections of the Act that use language identical to that contained in Section 505(a) in evaluating petitioner's argument that the "plain meaning" of the words used in that Section prohibit citizens from seeking civil penalties for past violations.

pressly authorizes courts hearing citizen suits to assess civil penalties under Section 309(d), the same provision that authorizes the assessment of such penalties in suits brought by EPA. There is no reason to suppose that Congress intended "two radically different interpretations [of Section 309(d)], one for citizen suits and one for EPA suits." Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198.

Furthermore, petitioner's contention (Pet. 15-16, 25) that citizens may obtain only injunctive relief is at odds with both the language of Section 505(a), authorizing the assessment of civil penalties, and common sense. As the court reasoned in Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1198-1199:

> The whole idea that Congress might have empowered citizens to seek civil penalties only prospectively is rather odd. Penalties are necessarily imposed on past violations. *** Citizen suits can certainly seek injunctive relief. The courts are fully empowered to impose sanctions for contempt, sanctions greater than those available under Section 1319(d). Thus, the theory of defendants and of the Hamker court would require us to believe that the provision empowering courts to enforce citizen suits with civil penalties was superfluous.

b. In addition to maintaining fidelity to the overall structure of the Act, the court of appeals' construction of Section 505(a) is fully supported by the only pertinent legislative history.[7]

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[7] In light of the ambiguity in the statutory language, petitioner's reliance (Pet. 8) on the "plain meaning rule" is misplaced. Cf. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 10 (1976) (quoting United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-544 (1940)) ("'[T]here certainly can be no "rule of law" which forbids [reference to legislative history], however clear the words may appear on "superficial examination."'").

Senator Muskie, the principal architect of the Act, explained that citizen suits are authorized "in the case of any person who is alleged to be, or to have been, in violation, whether the violation be a continuous one, or an occasional or sporadic one." 118 Cong. Rec. 33700 (1972) (emphasis added).[8] The legisla-

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[8] Petitioner attempts to discredit Senator Muskie's clear explanation of Section 505 by categorizing it as "a stray comment by one legislator" (Pet. 16). But the court of appeals correctly recognized that Senator Muskie's statements about the Clean Water Act may not be so lightly dismissed (Pet. App. 14a n.13):

> Because of his crucial role in the drafting and sponsorship of the bill that became the Clean Water Act, we give his comments significant weight. Other courts too have had occasion to rely on Muskie's remarks regarding the intent and meaning of the Act. See, e.g., American Frozen Food Institute v. Train, 539 F.2d 107, 118-20 (D.C. Cir. 1976) (quoting extensively from

tive history also refutes petitioner's argument (Pet. 13) that citizen suits were somehow viewed as less important than governmental enforcement actions.

(Footnote Continued)

> Muskie's comments as an aid to interpreting sections 301 and 304 of the Act); American Meat Institute v. EPA, 526 F.2d 442, 451-52 (7th Cir. 1975) (relying on written comments by Muskie, as "the principal author of the Act").

At the same time that it erroneously dismisses Senator Muskie's authoritative interpretation of Section 505, petitioner asks the Court to rely on various remarks in the Act's legislative history that describe citizen suits as "abatement" proceedings (See Pet. 15-16 & n.9). The court of appeals appropriately recognized (Pet. App. 13a-14a) that none of the passages cited by petitioner states that "abatement of ongoing violations is the only relief available under Section 505(a)." Thus, the legislative history relied upon by petitioner simply does not address the question presented. Senator Muskie's statement, on the other hand, speaks directly to the point at issue.

As the Senate Report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 64 (1971)), "[i]t should be noted that if the Federal, State, and local agencies fail to exercise their enforcement responsibility, the public is provided the right to seek vigorous enforcement action under the citizen suit provisions of Section 505." Thus, nothing in the legislative history supports petitioner's denigration of the role of citizen suits in Congress's overall enforcement scheme.[9]

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[9] There are distinctions between citizen suits and governmental enforcement actions, but those distinctions only highlight the fact that petitioner's narrow construction of Section 505(a) is not one of them. As the court of appeals explained (Pet. App. 11a (citation omitted)):

> Section 505(b), 33 U.S.C. Section 1365(b), provides that no citizen suit may be commenced less than sixty days after the plaintiff has given notice of an alleged violation to the Administrator,

c. The decision below avoids the near-total emasculation of the citizen suit provision that follows from petitioner's argument. There is neither evidence nor logic to support petitioner's contention that Congress meant to authorize expensive and time-consuming pre-

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(Footnote Continued)

> the state in which the violation occurs, and the alleged violator. The section also prohibits filing of a citizen suit if either the Administrator or the state has commenced and is diligently prosecuting a civil or criminal action in federal or state court. In such cases, however, a citizen is permitted to intervene as a matter of right. These provisions have been narrowly construed by the courts* * *, and the Act contains no other express limits on institution of citizen suits. We read the statute as requiring only those limits on citizen suit jurisdiction that Congress expressly provided; we see no reason to impose by implication limits which Congress could have, but did not, create.

paration for litigation that could be thwarted "the day, the hour, or the minute before a suit is filed." Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120, 1132 (D. Md. 1985). Indeed, the instant case well illustrates the illogic of petitioner's position. Petitioner does not contend that respondents could have known that petitioner's permit violations, which had been ongoing for years, suddenly ceased before suit was filed. Because of the time necessary for a polluter to analyze its discharges, obtain laboratory reports, and prepare and submit its DMRs, violations typically are not reported until at least a month after they have occurred. Accordingly, it would be physically impossible for anyone other than the polluter to determine whether, on any given day, its

discharges were in violation of its permit limitations. For this reason, one court has concluded that "Congress could not conceivably have meant that the violations literally be ones occurring at the time the citizen suit is filed." Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1194.

2. a. Contrary to petitioner's contention (Pet. 9-10), the decision below in no way conflicts with this Court's decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981). In Sea Clammers, the Court held that the comprehensive enforcement scheme contained in the Clean Water Act, including the citizen suit provision, leaves no room for implied private damages actions. The Court's concern was with the scope of

relief available to private persons outside that which is authorized by Section 505, not with the coverage of Section 505 itself.[10] It was in this context that the Court stated, in dicta, that Section 505 "authorizes only prospective relief" (453 U.S. at 6) and that citizens "may sue for injunctions" to enforce the Act (Id. at 14). The Court had no occasion to consider the scope of relief available under Section 505 itself, and nothing in Sea Clammers holds that citizen suits seeking civil penalties for past violations are pro-

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[10] The same situation occurred in City of Evansville v. Kentucky Liquid Recycling, Inc., 604 F.2d 1008 (7th Cir. 1979), cert. denied, 444 U.S. 1025 (1980), in which the plaintiffs sought to recover compensatory damages for themselves for defendant's past violations of the Act, not civil penalties for the United States Treasury. The court rejected this private remedy.

hibited. To the contrary, the Court noted that, in addition to injunctive relief, "civil penalties, payable to the Government, also may be ordered by the court. Section 505(a), 33 U.S.C. Section 1365(a)." 453 U.S. at 14 n.25. The Court also clearly recognized that citizens are authorized to act as "private attorneys general" (Id. at 13-17) in the event that government agencies fail to act.[11]

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[11] Petitioner's reliance (Pet. 14) on the Court's characterization in Sea Clammers of citizen suits as being of a "limited nature" (453 U.S. at 17 n.27) has no applicability to this case. The Court found support for that conclusion in the parallel--but not identical--citizen suit provision contained in the Clean Air Act, 42 U.S.C. 7604. Significantly, the Clean Air Act does not authorize the imposition of civil penalties in citizen suits, whether the penalties are for past or continuing violations; instead, only injunctive relief is authorized. Section 505(a) of the Clean Water Act, on the other hand, expressly authorizes courts to impose ci-

b. Petitioner relies most heavily on an asserted conflict between the decision below and the Fifth Circuit's decision in Hamker v. Diamond Shamrock Chemical Co., 756 F.2d 392 (5th Cir. 1985). Although the court below did state (Pet. App. 15a) that it disagreed with Hamker, the two cases present such different facts that it would not be appropriate to attempt a reconciliation of the two decisions here.

Hamker, like Sea Clammers, was essentially a damages action, although the plaintiffs in Hamker attempted to cloak their case in the garb of a citizen suit

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(Footnote Continued)

vil penalties. This distinction was explained by the Court in Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1195-1196 & n. 1.

under Section 505(a). Hamker involved a single discharge, an oil leak from a pipeline, that lasted about two weeks before it was detected and stopped. 756 F.2d at 394. Plaintiffs sought injunctive relief and civil penalties under the Clean Water Act and compensatory and punitive damages based on pendent state law claims. Id. The court held that subject matter jurisdiction under Section 505(a) was lacking, construing the Act as authorizing only those citizen suits that allege an ongoing violation of an effluent standard, limitation, or order imposed under the statute. 756 F.2d at 395, 396, 398-399. The majority opinion emphasized not only the fact that the alleged violation was limited to a single occurrence, but also that plaintiffs had failed even to allege that isolated event violated any effluent

standard, limitation, or order imposed under the Act (Id. at 396-397). The concurring opinion stressed "the narrow applicability of the holding of the Court" (Id. at 399 (Williams, J., concurring)). Judge Williams elaborated as follows (Id.):

> I would urge that the requirement that the polluter be "in violation" clearly is broad enough to cover the chronic episodic violator or the violator who intentionally "turns off the spigot" just before a citizen brings suit. In either of these circumstances, the statute should surely be interpreted to cover such violations as being current. Such circumstances are not at all the same as this case, so I wish to emphasize the difference between a single past event and a course of polluting conduct where continuity happens to be broken at the time citizen complaint is made and pursued. In the latter situation, the polluter is "in violation".

Here, unlike the situation in Hamker, petitioner violated its permit at least 160 times over the 22 months pre-

ceding the filing of suit (Pet. App. 45a n.12). Nothing in the Fifth Circuit's opinion suggests that it would have reached the result it did had it been confronted with a comparable situation, in which respondents could not have known at the time the complaint was filed that years of violations had suddenly ceased. In these circumstances, review of the conflict alleged by petitioner should await the consideration by the Fifth Circuit of a case presenting the issue here raised in a more closely analogous factual setting. Six citizen suits raising the question presented here on facts similar to the instant case are pending on appeal in the Fifth Circuit,[12] and that court should be

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[12] Sierra Club v. Shell Oil Co., No. 84-3583 (E.D. La. 1986), appeal pending, No. 85-3753 (5th Cir.); Sierra

given the opportunity to elucidate further its ruling in Hamker. The result may well be a decision to confine Hamker to its atypical facts, thereby obviating

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(Footnote Continued)

Club v. Monochem Inc., No. 84-147B (M.D. La. 1985), appeal pending, No. 85-3762 (5th Cir.); Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. 1013 (M.D. La. 1985), appeal pending, No. 85-3763 (5th Cir.) (four consolidated cases). In each of these cases, the polluters' DMR's showed violations subsequent to the filing of suit as well as before. That distinction, however, has no bearing on the jurisdictional issue presented. Clearly, subject matter jurisdiction cannot be made to turn on events that do not occur until after a complaint is filed. Were the rule otherwise, the court and the parties would have to wait some unknown period of time after the initiation of a suit to determine whether jurisdiction existed. Thus, the critical issue to be decided in the pending Fifth Circuit appeals is whether there must be a violation occurring on the date the complaint is filed. The Fifth Circuit's resolution of that question, in the context of cases alleging violations that occurred shortly before suit was filed, will thus require it to consider the same factual situation addressed by the court below.

the need for review by this Court. Cf. E. I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration in the courts of appeals.").

The possibility that the Fifth Circuit may narrow or refine its decision in Hamker is not at all speculative in light of the fact that, with the exception of district courts within the Fifth Circuit bound to follow Hamker, virtually every court to consider the Fifth Circuit's decision has rejected it. See Atlantic States Legal Foundation v. Al Tech Specialty Steel Corp., 635 F. Supp. 284, 286-287 (N.D.N.Y. 1986); Connecticut Fund for the Environment v. Job Plating Co., 623 F. Supp. 207, 213-214 (D. Conn. 1985); Sierra

Club v. Simkins Industries, Inc., 617 F. Supp. at 1131-1134; Student Public Interest Research Group v. AT&T Bell Laboratories, 617 F. Supp. at 1194-1199; Student Public Research Group v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1425-1426 (D.N.J. 1985). [13] We therefore suggest that review of the issue by this court would be premature at this time.

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[13] Petitioner notes (Pet. 22-23 n.15) the existence of 18 district court decisions that have addressed the issue here presented, but it fails to point out that, outside the Fifth Circuit, only a single court has accepted its position. That case, Pawtuxet Cove Marina, Inc. v. Ciba-Geigy Corp., 21 Env't Rep. Cas. (BNA) 1393 (D.R.I. 1984), 22 Env't Rep. Cas. (BNA) 1999 (D.R.I. 1985), appeal pending, No. 86-1227 (1st Cir.), merely cites Hamker and contains no independent analysis. In addition, the complaint in Pawtuxet, like the complaint in Hamker but unlike the complaint here, did not allege any continuing violations. 22 Env't. Rep. Cas. at 2000. Significantly, the complaint in Pawtuxet, like the complaint in Hamker, also sought

c. In addition to the fact that the Fifth Circuit may wish to reconsider or expressly limit Hamker, review of the issue presented is not warranted in this case because the judgment may be harmonized with Hamker under the alternative rationale noted by the district court (Pet. App. 38a-39a n.8) and urged by the United States as amicus curiae in the court below. As previously noted, Section 505(a) authorizes citizen suits against persons alleged to be in violation of the Act. The district court reasoned that, even if petitioner's

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(Footnote Continued)

damages, in addition to other relief. 21 Env't Rep. Cas. (BNA) at 1394-1396 (D.R.I. 1984). In any event, the decision is of limited precedential value in light of the pendency of an appeal in which the First Circuit will resolve the jurisdictional question not only for the District of Rhode Island but for the entire Circuit.

theory with respect to past violations were accepted, a complaint that alleged in good faith the existence of continuing violations would not be subject to dismissal upon later discovery that the violations had ceased prior to suit (Pet. App. 38a-39a n.8). Although the court of appeals did not rely on this rationale (Id. at 7a-8a n.9), "'this Court reviews judgments, not opinions.'" Bowen v. American Hospital Association, 106 S. Ct. 2101, 2112 n.11 (1986) (quoting Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 842 (1984)). In Hamker, no good faith allegation of a continuing violation was made, nor would one have been possible in light of the facts. In the instant case, by contrast, there is no serious question that respondents' allegations of continuing violations

were made in the utmost good faith.[14] Thus, petitioner has failed to show that review of the judgment below would product a different result.

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[14] Petitioner contends (Pet. 20-21) that here, as in Hamker, the only allegations were that violations of the Act might occur in the future. In Hamker, however, such allegations were wholly speculative, while in the instant case respondents relied on a history of years of continuing violations that, so far as the public records demonstrated, had not been abated at the time suit was brought.

We note also that petitioner's emphasis (Pet. 21 nn. 12 & 13) on the fact that the parties stipulated that petitioner's last violation occurred on May 15, 1984, does not defeat the logic of the district court's alternative rationale. The stipulation was, of course, entered after the good faith allegations in the complaint were made, and it cannot alter the fact that, when suit was initiated, the only publicly available information indicated that petitioner was still in violation of its permit limitations.

3. Finally, petitioner raises a "parade of horribles" if its construction of Section 505(a) is not adopted. Petitioner's arguments are based on sheer speculation having nothing to do with the facts of this case. For example, petitioner relies on the Hamker court's concern that allowing citizen suits for past violations would place an undue burden on the federal courts by permitting all state damages claims that could be brought under pendent jurisdiction to be litigated in a federal forum. Hamker, 756 F.2d at 396. While that may have been a legitimate concern in Hamker, in which plaintiffs sought both compensatory and punitive damages, no state law claims were ever raised in this case. Moreover, other than Pawtuxet Cove Marina Inc. v. Ciba-Geigy Corp,

supra note 13, of the 18 district court decisions cited by petitioner (Pet. 22-23 n.15), only one even suggests that a pendent state law claim may have been raised. See Sierra Club v. Copolymer Rubber & Chemical Corp., 621 F. Supp. at 1016 n.13. In any event, the court of appeals correctly recognized that, under the principles established in United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966), a district court "would be acting within its discretionary autority in refusing to exercise jurisdiction over state law damage claims" (Pet. App. 17a).[15]

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[15] Petitioner also suggests (Pet. 24) that citizens will be encouraged to bring damages actions disguised as citizen suits in order to recover attorney fees for their state law claims. Petitioner, like the court of appeals in Hamker, fails to offer any support for the notion that the Clean Water Act's attor-

In another makeweight argument, petitioner suggests (Pet. 25) that excessive numbers of citizen suits will disserve the policies of the Clean Water Act by interfering with the "primary enforcement responsibility" of EPA and the States. This assumption is flatly at odds with Congress's intent in enacting Section 505. As the Senate Report explained (S. Rep. 92-414, supra at 80):

> The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same. Therefore, the participation of citizens in the courts seeking enforcement of water pollution control requirements should not result in inconsistent policy.

(Footnote Continued)

ney fee provision, 33 U.S.C. 1365(d), necessarily extends to attorney fees incurred in the pursuit of pendent state law claims. Cf. Hensley v. Eckerhart, 461 U.S. 424, 434-435 (1983).

In fact, petitioner makes no credible case that citizen enforcement powers are not being responsibly employed, nor could it do so if it tried.[16] Citizen enforcement is working very well, as documented in a recent Senate Report and a study performed for the Environmental Protection Agency. See S. Rep. 99-50, 99th Cong., 1st Sess. 28

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[16] Petitioner argues (Pet. 24-25 n.18) that "[i]t is common knowledge in the industry" that many defendants settle citizen suits by making contributions to the plaintiff groups bringing the suits or to projects sponsored by those groups. Nothing of the sort occurred here; the nearly $1.3 million in civil penalties assessed by the district court will be paid to the United States Treasury. Moreover, the authority petitioner cites for the "common knowledge in the industry" consists of three letters received by a single attorney who then wrote an article on the general subject of citizen suits. See Schwartz & Hackett, Citizen Suits Against Private Industry Under the Clean Water Act, 17 Natural Resources Lawyer 327, 328 & n.6, 360-365 (1984).

(1985);[17] Environmental Law Institute, Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes, at V 5-11 (Sept. 1984). Finally, the participation of the United States as amicus curiae in a number of

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[17] Petitioner quotes from the Senate Report out of context. It is true, as petitioner notes (Pet. 22), that the Report remarked on the increase in the number of citizen suits filed in recent years, but petitioner attempts to convey the totally inaccurate impression that that increase is at odds with congressional intent. In fact, however, the Report states in three sentences preceding the sentence quoted by petitioner (S. Rep. 99-50, supra, at 28):

> Citizen suits are a proven enforcement tool. They operate as Congress intended--to both spur and supplement to [sic] government enforcement actions. They have deterred violators and achieved significant compliance gains.

these cases, including the instant one, demonstrates the total lack of foundation for petitioner's fear of a great number of frivolous citizen suits working any interference with EPA's primary enforcement authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NOVEMBER 1986

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CHESAPEAKE BAY FOUNDATION, INC., and NATURAL RESOURCES DEFENSE, Plaintiffs,	)	Civil Action No.
v.	)	84-0366-R
GWALTNEY OF SMITHFIELD, LTD., Defendant.	)	

FINDINGS OF FACT AND CONCLUSIONS
OF LAW AS STATED FROM THE BENCH

BEFORE: Honorable Robert R. Merhige, Jr.,
United States District Judge

Richmond, Virginia

August 28, 1984

THE COURT: This is a motion by plaintiffs for partial summary judgment, on the issue of liability, in a "citizens' suit" to enforce certain requirements of the Clean Water Act, 33 U.S.C. § 1311 et. seq. (the Act), against a food-processing facility. No effort was made to set up a factual issue that was not present; there are no factual issues here. The matter is ripe for summary judgment.

The first of two plaintiffs here, Chesapeake Bay Foundation, is a non-profit organziation organized under the laws of Maryland. Its principal place of business is in Annapolis, and it has an office in Richmond. It is a regional conservation organization with thousands of members in the Chesapeake Bay area. Some of its members reside in Virginia in the vicinity of the Pagan

River, and they use and enjoy the river and the water system. (All this is set forth in plaintiffs' uncontested affidavits.)

The Court finds that the quality of the nation's waters and waters of the Commonwealth directly affects the health, recreation and esthetic environmental interests of that organization and its members.

The Court finds that the interests of that organization and its members have been, are being, and will be adversely affected by the failure of defendant, Gwaltney of Smithfield, Limited (Gwaltney), to comply with its National Pollution Discharge Elimination System (NPDES) permit.

The second plaintiff, Natural Resources Defense Council, is a non-profit membership organization organized

under the laws of the State of New York with offices in New York, Washington and San Francisco. It has over seven hundred individual members within the Commonwealth of Virginia. They, like the members of the Chesapeake Bay Foundation, utilize the river and are affected by Gwaltney's failure to comply with its NPDES permit. (This, too, is by uncontested affidavit).

Jurisdiction in the case is pursuant to 33 U.S.C. Section 1365(a)(1); the Court finds from the uncontradicted evidence that on October 23, 1974, the Virginia State Water Control Board issued, to the defendant, NPDES Permit Number VA 0002844, pursuant to VA. Code Section 62.1-44.15, Section 402 B. of the ACT, and an approval of Virginia's program by the Administrator of the United States Environmental Protection Agency

under Section 402 of the Act, 33 U.S.C. § 1343, dated March 31, 1975.

The permit was reissued on October 23, 1979, modified by the addition of a TKN limitation on August 1, 1980, and it has remained in effect to this date.

The defendant's monthly reports under its permit, which are required to be filed, reflect that between January 1979 and June 15, 1984, it has on at least 237 occasions discharged substances into the Pagan River, which is a tributary of the James River and Chesapeake Bay, in excess of the amounts allowed by its permits. Defendants' monthly reports may be used to establish civil liability under the Act. See, e.g., United States v. Ward, 448 U.S. 242 (1980).

Under 33 U.S.C. 1131(a), any

discharge is unlawful unless it is authorized by one of several specified sections of the Act, including Section 402(b) of the Act, 33 U.S.C. 1342(b). Section 402(b) provides that compliance with the permit issued pursuant to this section shall be deemed compliance with Section 301 of the Act, 33 U.S.C. § 1311; for purposes of enforcement under Section 309 of the Act, 33 U.S.C. § 1319, or under Section 505 of the Act, 33 U.S.C. § 1365.

Without more, then, to violate an NPDES permit condition is to violate the Act. E.P.A. v. State Water Resource Control Board, 426 U.S. 200, 205, (1976), Natural Resources Defense Council v. Costle, 568 F.2d, 1369, 1374-77 (D.C. Circuit 1977).

There being no genuine issue as to any material facts, the plaintiffs

are entitled to summary judgment in the form of a declaration that the defendant has violated the Act, for which it must be held liable. It is so ORDERED.

Gentlemen, we might just as well set it down for whatever else you want to do with it. I will see you in chambers. Thank you for your help.